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NO. 92-602

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER
and STEVEN LONG,

Petitioners,

v.

MELVIN HICKS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The National Employment Lawyers Association respectfully submits this brief amicus curiae in support of Respondent in this case. The written consents of all parties have been filed with the Clerk of this Court.

I. INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a nationwide bar association of over 1500 lawyers who represent individual employees. Founded in 1985 and headquartered in San Francisco, NELA members comprise a large segment of the leaders of the bar specializing in employment discrimination on behalf of employees. NELA members regularly handle cases of discrimination.

In light of its interest in the application of employment law, NELA has filed several amicus briefs in this Court as well as briefs before the Circuit Courts of Appeals and various State Supreme Courts.

Because of its practical experience with the issues at bar, NELA is well suited to brief this Court on the importance of the issues and

the practical effects of the Court's decision beyond the immediate concerns of the parties.

II. SUMMARY OF THE ARGUMENT

Employer petitioners and their supporting amici seek to undermine the longstanding burden of proof analytic framework established for the disposition of employment discrimination cases. NELA respectfully suggests that the extant burden of proof scheme established by this Court is well grounded in law, fair in application and sound as a matter of public policy. It presents no undue burden on truthful defendant employers nor does it create an undue burden on the judicial system. The Eighth Circuit followed such burden of proof framework in this disparate treatment racial discrimination case; no legal or policy basis exists for reversal herein.

Further, changes suggested by petitioners in the burden of proof scheme would allow lower

court judges to substitute hypothetical conjecture or their own business judgment for the articulated reasons actually proffered by defendant employers. The district court's decision also violates the holding of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) providing that plaintiffs be afforded a fair opportunity to demonstrate pretext.

Lastly, although progress has been made in the elimination of discrimination, individuals seeking to employ the disparate treatment model, particularly moderate income complainants, continue to have difficulty obtaining legal representation and prosecuting their claims. Change in the shifting burden of proof scheme would undercut the ability of plaintiffs to utilize circumstantial evidence and would decrease the ability of employees to obtain legal representation.

III. ARGUMENT

1. Most Disparate Treatment Plaintiffs Rely Upon the Three Stage McDonnell Douglas-Burdine Analysis to Establish Employment Discrimination:

A disparate treatment plaintiff can prove discrimination either by direct evidence of discrimination or by use of the shifting burden of proof scheme. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Discrimination, however, is an elusive entity, involving intent of the alleged discriminating official. As this Court noted in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716-717 (1963):

> The law often obliges finders of fact to inquire into a person's state of mind.... It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else."

> Id. at 716-717 (quoting Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (1885).

In proving such state of mind or discriminatory intent, this Court noted in Aikens that direct evidence of employment discrimination is difficult if not impossible to obtain. Thus, as noted in Aikens, 460 U.S. at 716: "There will seldom be 'eyewitness' testimony to the employer's mental processes." In other words, few employers leave behind the veritable "smoking gun."[1]

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[1] See also Reeder-Baker v. Lincoln Nat. Corp., 834 F.2d 1373, 1377 n.9 (7th Cir. 1987) ("Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses ... will always be possible and often plausible."); Thornbrough v. Columbus and Greenville Railroad Co., 760 F.2d 633, 638 (5th Cir. 1985) ("Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree .... Employers are rarely so cooperative as to include a notation in the personnel file, 'fired because of age....'"); Dister v. Continental

Accordingly, the vast majority of disparate treatment plaintiffs must rely upon the three part McDonnell Douglas - Burdine analysis. Under such analysis, a presumption of discrimination is established once an employee establishes a prima facie case of discrimination. Burdine, 450 U.S. at 253-54. Should the defendant choose not to articulate a reason for its actions, the presumption goes unrebutted and the plaintiff establishes his case. As the Court noted in Burdine, 450 U.S. at 254:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Group, Inc., 859 F.2d 1108, 1112 (2d Cir. 1988) ("Direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it.")

See also Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), citing Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977), wherein this Court noted that a defendant whose acts are unexplained will be presumed to have discriminated because "these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."

Should the defendant so choose, it may rebut the presumption by the articulation of legitimate, nondiscriminatory reason or reasons for the adverse action. Burdine, 450 U.S. at 254-55. The reasons to be proffered through the introduction of admissible evidence, however, are "the reasons for the plaintiff's rejection" Burdine, 450 U.S. at 255, rather than some after-articulated but plausible reasons that could have been - but were not - the reason for the action taken. Burdine further cautions that:

"An articulation not admitted into evidence will not suffice." Id., 450 U.S. at 255 n.9.

Once the Defendant having introduces its asserted reasons, the plaintiff must then prove that the proffered reasons were not the true reasons but rather were merely a pretext for discrimination. Burdine, 450 U.S. at 253. This three part analytic framework, unanimously adopted by this Court in McDonnell Douglas, and unanimously reaffirmed by this Court in Burdine, has long been accepted and is remarkably successful in sifting through factually intensive cases to discern the real reason for the defendant's adverse action.

2. If Plaintiff Carries his Ultimate Burden of Proof that the Defendant's Articulated Reasons are Pretextual, the Initial Presumption of Discrimination Stands Unrebutted and Plaintiff Prevails.

Employees do not have direct access to the employer's decision making. Accordingly,

plaintiffs most often present their case by circumstantial evidence.[2]

Hicks presented circumstantial evidence of discrimination; it established an illegitimate racially motivating reason for the actions of the defendants. Especially critical evidence herein is petitioner employer's "percentages and numbers" memorandum which sought to "balance" the numbers of whites to blacks in the supervisory workforce. Hicks introduced that study in which petitioner's agent analyzed each supervisory position by race. The study concluded that white employees at St. Mary's "control only 38.62% (8.11 divided by 21) of the

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[2] As noted in Aikens, 460 U.S. 711, 714 n.3 (1983): "As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves ... [T]he District Court should not have required [plaintiff] to submit direct evidence of discriminatory intent."

decision making power." The study then made suggestions to increase the number of whites so that they would control "55.29% of the power." (Joint Appendix 81-85).[3]

Plaintiff further showed that after issuance of this memorandum, four black supervisors and no white supervisors were discharged at St. Mary's. All four black supervisors were replaced by white supervisors. Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1246 (E.D. Mo. 1991). Hicks also presented evidence of actions evidencing animus[4] and

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[3] Defendants' decision makers self-servingly disclaimed knowledge of this "smoking gun" study. However, an employer can not create a racial "numbers and percentages" memorandum, set about to achieve the goals of that memorandum by discharging black supervisors and replacing them with white supervisors and then, when challenged, "stick its head in the sand" and disclaim knowledge.

[4] After demotion, Powell, the white Chief of Custody, followed plaintiff outside, stepping on his heels and provoking him to fight. Hicks testified:

> So, I asked him, I said, "Hey, you're a man and I am a man. Hey, you don't have to treat me like that, you know, treat me like a man."
> Just like that.
> And he kept looking at me, laughing in my face.
> So I asked him, "What are you trying to do, provoke me and make me fight you?"
> And he said yes. (Joint Appendix 22-24).

disparate treatment between plaintiff and comparator employees[5] as he is entitled to do. As noted in Teamsters v. United States, 431 U.S. at 335 n.15, "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."

As this Court noted in Burdine, 450 U.S.

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[5] Hicks, a black supervisor, was disciplined not for his own infractions but for those of his subordinates; Hefele, a white supervisor, was not so disciplined. Further, white employees Newland, Doss, Ratliff and Slinkard were either not disciplined or disciplined less severely for infractions as or more serious than those of Plaintiff's subordinates. Hicks v. St. Mary's, 756 F. Supp. at 1246-49.

248, 255 n.10: "[T]here may be some cases where the plaintiff's initial evidence combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." This is just such a case.[6]

In the instant case, the defendants articulated two reasons for the demotion and discharge of Hicks: the severity and accumulation of violations committed by Hicks. Through effective cross-examination of the decision maker and reliance upon plaintiff's

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[6] Thus, based on the totality of the evidence, this case can not be characterized as a "pretext only" case, e.g. a case where the sole reason for finding discrimination is the discrediting of the Defendant's reason for discharge. It is more akin to the "pretext plus" case presenting a multitude of circumstantial evidence. Such labels may present a false dichotomy, however, as each case must be determined at trial on its particular facts. In a "pretext only" case, the credibility, vel non, of the decision maker often sways the factfinder. See Tye v. Board of Education, 811 F.2d 315, 318-320 (6th Cir.) cert. denied, 484 U.S. 924 (1987).

testimony and evidence, Hicks discredited - or established as pretext - the defendants' asserted reasons for their action. The district court, Hicks v. St. Mary's, 756 F. Supp. at 1251, affirmed by the circuit court, found that Hicks proved that the reasons proffered by defendants were pretextual.

Once plaintiff proves that the asserted reasons for the discriminatory action are not the true reasons - in other words once he proves such reasons pretextual - such discredited reasons (now little more than rationales) drop from the case.[7] Defendant then is left in no greater stead than had he not presented a

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[7] See Tye v. Board of Education, 811 F.2d at 318-320 (Reversal of lower court's dismissal on grounds that defendant had given "evasive and contradictory testimony," had admitted that the articulated reasons were "reconstructed" for the litigation, and that, in actuality, had had no reason for his decision.)

defense at all.[8]

Plaintiff's prima facie case thus standing effectively unrebutted, the presumption of discrimination stands and plaintiff prevails as a matter of law. Thornbrough v. Columbus and Greenville Railroad Co., 760 F.2d 633, 639 (5th Cir. 1985):

> By disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reason for the employer's decision, we presume that the employer was motivated by discriminatory reasons.

See also, Bishopp v. District of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986):

> Defendant's explanation for its decision was unworthy of credence as a matter of law. Such a blatantly

[8] Because the plaintiff retains the burden of proof of the issue of pretext, such analysis does not unfairly convert the defendant's burden of presentation to a burden of persuasion.

> pretextual defense carries the seeds of its own destruction. That is, it does not even satisfy the defendant's "intermediate burden" of producing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."

Policy as well as legal reasoning supports such a conclusion. To otherwise accord the defendant, whose pretextual reasons did not withstand scrutiny, a greater legal footing than that accorded the defendant who, by truthfully standing mute before the court, faced a presumption of discrimination, would place a wholesale premium on dishonest defendant ingenuity at the expense of the tribunal.

3. The Decision of the District Court to Choose a Reason for Discharge Not Articulated by the Defendant is Contrary to McDonnell Douglas and Clearly Erroneous:

Once the defendant's articulated reasons are discredited by the factfinder, only two

choices remain: credit the plaintiff's reasons or roam outside the record to find yet a third reason not articulated by defendant. In the instant case, rather than granting judgment for the plaintiff, the district court engaged in the clearly erroneous conduct of straying from the articulated reasons of the petitioners evidenced on the record and finding yet a third secret reason - alleged "personal" motivation - that "could have" motivated the defendant. Hicks v. St. Mary's, 756 F. Supp. at 1251-52.

In the instant case, at no time did the defendants assert - nor did the record evidence establish - that Chief of Custody Powell had claimed a personality conflict or personally motivated difficulties with the plaintiff.[9]

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[9] Thus, Supervisor Powell denied on cross examination that there were "difficulties" between himself and plaintiff, stating: "I can't say that there was difficulties between he and I At no time was there any kind of personal - (sic)" (Joint Appendix 46).

Indeed, the sole evidence cited by petitioners in their attempt to buttress the lower court's substitution of his own conjecture for the defendants' articulated reasons is the plaintiff's testimony that his white supervisor admitted that he wanted to pick a fight with plaintiff. When a white supervisor admits to a black subordinate that he wants to pick a fight and deliberately attempts to provoke that fight, and the record establishes no other motivating rationale for the white supervisor's actions, that incident constitutes circumstantial evidence of race discrimination rather than some secret reason of "personal" motivation plucked from the air by the lower court judge.[10]

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[10] See Pettit v. Sears, Roebuck & Co., 32 Fair Emp. Prac. Cases (BNA) 1867 (D.C. Kan. 1983) ("Unexplained, unfair treatment meted out to a black man carries an inference of racial discrimination with it."); C.f. Smith v. Board

It is not the provence of the tribunal in a pretext discrimination case to scour the record - as Judge Limbaugh apparently did here - to determine if there may possibly be an unarticulated reason to support discharge. Since few employees of long standing have a perfect record, there often can be found such plausible non-discriminatory reasons. Rather, it is the job of the factfinder to attempt to determine the actual mindset of the alleged discriminating official at the time of the adverse action - to determine what actually did transpire as contrasted to speculation as to what could have or should have transpired.

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of Education, 365 F.2d 770 (8th Cir. 1966) (decision of then Judge Powell) ("However, in this day race per se is an impermissible criterion for judging either an applicant's qualifications or the district's needs. And this applies equally to considerations ... when these descriptions amount only to euphemistic references to actual or assumed racial distinctions.)

So too, interjection of unarticulated rationales fundamentally shifts the factual inquiry, distracting the tribunal into the irrelevant inquiry as to whether an employer can now find a legitimate reason for discharge, even if that reason is found only in the course of litigation long after the discharge.

Pretext analysis assists in the determination of actual occurrences by allowing the factfinder to assess all of the evidence proffered by the defendant and all of the evidence and arguments of plaintiff to rebut such reasons or rationales. Should the defendant proffer two reasons but hold a third "up its sleeve" only to be presented if necessary, or should the factfinder substitute such third reason at the close of the trial, then the three part analytic framework must necessarily fail. In that instance, the

plaintiff employee then has been deprived of the opportunity to rebut the asserted reasons for discharge. Accordingly, no analysis of pretext can be applied.

Moreover, allowing the factfinder to stray from the record to find "hypothetical" reasons imposes a fundamentally unfair burden on the plaintiff. The plaintiff is effectively denied the opportunity to present evidence to rebut the non-disclosed, assertedly "true" reason for discharge. Such action flies in the face of the teaching of McDonnell Douglas which holds that plaintiff "must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to reemploy was a pretext or discriminatory in its application." Id. 411 U.S. at 807.

Had the defendants presented the asserted third reason at trial, Hicks could have further

developed the record to establish the lack of "personal" motivation for animosity. Plaintiff could have also introduced expert witness evidence to establish the types or effects of racial stereotyping behavior, similar to the expert testimony introduced by the plaintiff in Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36 (1989).

While untruthful defendants rightfully bear the risk of an adverse judgment if plaintiff establishes pretext, this differs in no manner from any other civil suit in which the party who lies loses the suit. Moreover, truthful defendant employers are not victimized by the three part analytic framework, for it is well recognized by the federal judiciary that an employer can fire an employee for a good reason or a bad reason, so long as the reason is not a discriminatory one. What the defendant must do

in a pretext analysis case, however, is present all its reasons to the tribunal or face the consequences that its unexplained conduct will subject it to a presumption of discrimination.

4. Racial Stereotypes or Antagonistic Behavior Can Mask Racial Discrimination:

Just as this Court found offensive stereotypical assertions concerning women, Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) this Court should also look with skepticism on the district court's assertion that a discharge of a black male first line supervisor by his white superior may be due to a "personally motivated" decision. Such finding is similar to a finding that the black subordinate has a "personality conflict" or an "attitude problem" and can often mask discriminatory intent. See Martin v. Thompson Tractor Company, 486 F.2d 510, 511 (5th Cir. 1973): "The trial court was not insensitive to the danger of accepting a

general term such as 'poor attitude' as adequate grounds for a discharge, if any racial overtones were present in the relationship between the parties." The Fifth Circuit noted that the district court carefully recognized that:

> The question that really becomes a very tough one for the court stems from the fact that the words 'attitude,' 'good attitude,' or 'bad attitude,' or 'lack of cooperation' can very easily be the label to cover and conceal racially motivated prejudices and discriminations, in fact, under some other title that looks acceptable.

Courts have found black males to have been painted with stereotypical labels that mask discriminatory intent. Thus, the black male plaintiff in Bibbs v. Block, 778 F.2d 1318, 1320 (8th Cir. 1985) (en banc) was characterized as a "black militant." Another black applicant was found to be "a little on the smart aleck side." Wilson v. City of Aliceville, 779 F.2d 631, 633 (11th Cir. 1986).

5. **Black Males Remain Victims of Employment Discrimination:**

Black men remain "unchallenged for last place in every important demographic statistic."[11] Persistent evidence of societal racial discrimination exists. Black men are disproportinately unemployed, having an unemployment rate of 12.2% compared with 11.5% for black women, 4.4% for white men and 4.9% for white women.[12]

Further, black men disproportionately are found in low-status labor occupations. Only 14% of working black men are employed in managerial and professional jobs, as compared

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[11] Note, Invisible Man: Black and Male Under Title VII, 104 HARVARD LAW REVIEW 749 (1991) quoting Douglas Glascoe, Dean of Howard University quoted in Welsh, Young, Black, Male and Trapped, Wash. Post, Sept. 24, 1989.

[12] Note, supra, at 752, citing U.S. Dep't of Labor, Employment and Earnings 19 (Aug. 1990).

with 18.2% of working black woman, 26.4% of white men and 26.5% of white women.[13]

Commentators also note the difficulty faced by the black male such as plaintiff Hicks who attains a supervisory position of authority over subordinate white employees.[14] Indeed, this record shows evidence of such conflict. Thus, the lower court noted that Tunney, a white subordinate, cursed Hicks, his black supervisor, with highly profane language. Hicks requested that Tunney be disciplined but Hick's white superior denied the request.

6. **Access to Legal System Continues to Remain Restricted for Plaintiffs:**

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[13] Id. at 753, citing U.S. Dep't of Labor, Employment and Earnings 19 (Aug. 1990).

[14] Note, Invisible Man: Black and Male Under Title VII, 104 HARVARD LAW REVIEW at 756-759 (1991); R. Farley & W. Allen, The Color Line and Quality of Life in America, 257, 281, 287; T. Kochman, Black and White Styles in Conflict 7-15, 74-88 (1981).

Access to the legal system for alleged victims of employment discrimination continues to remain limited. In many cases, the actions of the defendant - particularly discharge - renders the putative plaintiff financially encumbered and resourceless.

Although the EEOC has extensively litigated employment discrimination cases, and while its litigation efforts have been responsible for many of the larger class action victories, its ability to litigate many of the single discharge cases has necessarily been restricted by budgetary and personnel constraints.

Plaintiffs have the right to bring their own lawsuit. However, few discharged complainants have the financial resources to pay for legal services - especially if the skirmish turns into a nine year war such as in the instant case. Such putative plaintiffs are often

dependent upon attorneys able to accept their cases on contingency. However, attorneys with experience in employment discrimination able to undertake such litigation are increasingly rare. As a practical matter, those attorneys that do agree to representation of the near resourceless plaintiff screen their cases rigorously and can take only a limited few.

Thus, the "pretext only" case - not present herein - where there is no other circumstantial evidence of discrimination except the asserted pretextual nature of the defendant's reason for discharge is a statistical rarity.[15] Far more frequent is the case of the putative plaintiff with "pretext plus" evidence of discrimination

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[15] How truly rare "pretext only" cases are can be seen by contrasting the limited handful of such cases with the number of EEOC charge filings - 945,000 in nine years. See Perceptions and Research on the Effectiveness of the EEOC 43 Lab. L. J. 249, 254 (1992).

who simply can not afford an attorney nor find one willing to undertake the long legal battle on a contingent fee basis.[16] The inability to find counsel is especially true with respect to complainants of low and moderate income, because the backpay damages are likely to be low.

7. **Reduction of Case Backlog Should Be Accomplished By Increased Use of Alternative Dispute Resolution (ADR) and Other Settlement Techniques Rather Than By Summary Judgment Which is Rarely Appropriate in Cases Alleging Discriminatory Intent:**

In the twenty nine years since the enactment of Title VII, discrimination cases have unfortunately remained a federal mainstay.

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[16] Thus, in a 1991 survey and report conducted by NELA entitled "Unprotected Rights: The Increasing Barriers Preventing Victims of Employment Discrimination From Obtaining Legal Representation," NELA found that complainants have difficulty finding a lawyer. The survey found that almost two thirds (61%) of the lawyers surveyed stated that they reject 80% or more of requests for employee representation; forty-four percent (44%) decline to represent more than 90% of the employees seeking help.

However, attempts at a reduction of the case backlog by tinkering with the established burden of proof scheme or by summary judgment disposition will undoubtedly fail for the factual inquiry in a pretext disparate treatment case remains the determination of the intent of the defendant at the time of the alleged discriminatory action. Such inquiry, dependent largely upon the credibility of the parties, is not readily disposed of by summary disposition. See, for example, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir.)(en banc), cert. dismissed, 483 U.S. 1052 (1987).

Reduction of case backlog can best be achieved by increased use of alternative dispute resolution mechanisms, (ADR), particularly the increased use of mediation. It has now taken Hicks close to nine years to litigate his discharge. It is the rare plaintiff who would

relish such a protracted battle if a reasonable truce can be structured through the offices of a court appointed mediator seeking resolution at the early litigation stage.

III. CONCLUSION

Changes in early settlement procedures are well warranted; restricting plaintiff's access to the courts by the change in the well established burden of proof scheme is neither well founded in law or public policy. Accordingly, NELA respectfully seeks affirmance of the decision of the Eight Circuit herein.

Respectfully submitted,

Janette Johnson
Law Offices of Janette Johnson
3614 Fairmount Street, Suite 100
Dallas, Texas 75219
(214) 522-4090

Counsel of record
National Employment Lawyers Association